IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

FRIDAY, THE 10TH AUGUST 2007 / 19TH SRAVANA 1929

EFA.No. 18 of 2001()

ORDER IN EA NO.374/1999 IN EP.283/1997 IN OS NO.858/1987 of II ADDL.SUB COURT,THRISSUR

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APPELLANT/IST RESPONDENT/DECREE HOLDER:

KUNHUNNI S/O.KAILATHUVALAPPIL UNNEERI, AYYANTHOL VILLAGE, THRISSUR TALUK.

BY ADV. SRI.P.K.ASHOKAN

RESPONDENTS/CLAIM PETITIONER/JUDGMENT DEBTOR:

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1. GEORGE, S/O.KOTTARAPPARAMBAN KOCHAPPAN, VADOOKARA, KOORKKANCHERI VILLAGE, THRISSUR TALUK.

2. RAGHAVAN, S/O.KAILATHUVALAPPIL VELAYUDHAN, THAIKKATTUSSERI, EDAKKUNNY VILLAGE, THRISSUR TALUK.

R1 BY ADV. SRI.K.P.DANDAPANI

THIS EXECUTION FIRST APPEAL HAVING BEEN FINALLY HEARD ON 10/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. PADMANABHAN NAIR ,J

E.F.A.No.18 of 2001

Dated, this the 10th day of August, 2007

JUDGMENT

Decree holder/first respondent in E.A.No.374/1999 in E.P.No.283/1997 in O.S.No.858/1987 on the file of the Subordinate Judge, Thrissur is the appellant. Appeal is filed against an order passed by the executing court allowing a claim petition filed by the first respondent herein under Order XXI Rule 58 of CPC. Appellant filed O.S.No.858/1987 against the second respondent/judgment debtor on 19.10.1987 for realisation of Rs.20,400/- with interest. The suit was decreed on 23.2.1989. Initially he filed E.P.No.397/1990 and petition scheduled property was attached. Thereafter the decree holder filed E.P.No.645/1991. The second respondent was arrested and detained in civil prison. While the second respondent was in prison he sold the property to the first respondent/claim petitioner as per sale deed No.4044/1996 of Cherpu Sub Registry. Thereafter the appellant filed E.P.No.283/1997 for sale of the plaint schedule property. In that E.P. the first respondent filed E.A.No.374/1997 under Order XXI Rule 58 of CPC contending that he purchased the plaint schedule property as per sale deed No.4044/1996 of Cherpu Sub Registry and on that day there was no attachment or charge on the plaint schedule property. It was contended that hence the property is not liable to be sold for the debt of second respondent/judgment debtor.

2. Appellant filed a counter affidavit contending that sale deed was

executed by the judgment debtor while he was undergoing detention in the civil prison in execution of the very same decree in E.P.No.645/1991. It was contended that the sale deed was executed with the sole intention to defeat or defraud the decree holder and there was no bona fides or consideration. It was also contended that though he had attached the plaint schedule property in E.P.No.397/1990 he could not proceed against the property because it was in the possession of judgment debtor and others. It was contended that the property originally belonged to the father of the judgment debtor and after the death of father all of his legal heirs including judgment debtor inherited the property. So he prayed for dismissal of the claim petition.

3. On the side of respondents Exts.A1 and A2 proved and marked. Appellant produced Exts.B1 to B4. First respondent herein gave evidence as PW1. Appellant gave evidence as RW1. Executing Court found that it would appear that Ext.A1 sale deed was executed by respondents 1 and 2 with a view to defeat the decree holder but allowed the claim petition on the ground that there was no attachment or charge on the plaint schedule property at the time of execution of sale deed. Challenging that order this appeal is filed.

4. Learned counsel appearing for the appellant has argued that the Sub Judge failed to understand the scope of enquiry in this proceedings. It is argued that after amendment of the CPC when a claim petition under Order XXI Rule 58 of CPC is filed the Executing Court will have to consider the title and all other

issues arising for consideration as if in the suit. It is argued that though Section 53 of the Transfer of Properties Act provides for a suit by the creditor in a representative capacity the decree holder is entitled to raise such a plea in a counter filed to a claim petition filed under Order XXI Rule 58 of CPC. It is also argued that to apply the legal principles under Section 53 of the Transfer of Properties Act, there need not be any charge or attachment even a subsequent creditor can assail a transfer under Section 53 of the Act. In **Ithakku Abraham v. Kesavan Damodaran (1987 (1) KLT 704)** a learned Single Judge of this Court found that even if the decree holder is to be considered as a subsequent creditor, there is nothing precluding him from resorting to the provisions of Section 53 of the Act to avoid a transaction intended to defeat the creditors of the judgment debtor. In the above cited decision this Court relied on the principles laid down in **Umar Sait v. Union of India (1965 AIR Madras 395)** in which it was held that to avoid a transfer by a debtor under Section 53 of the Act it is not necessary that the transferor should have been actually indebted at the time he makes the transfer and a transfer intended to cheat a future creditors would be equally voidable at their instance. In **United Industries (India) v. Mathai (1985 KLT Short Notes Case No.9, Page 6)** it was held that the burden of proof is on the debtor to prove that he assigned the property. It is for the person who claims benefit under the document establishes that he purchased the property for sufficient consideration and in good faith. In **George Antony v. Kerala State Financial Corporation**

(1989 (1) KLT 486) a Division Bench of this Court held that the decree holder can defend the claim raising a contention available under Section 53 of the Act. A reading of the order passed by the executing court shows that it has not considered any legal principles arising for consideration. So I have no other option but to set aside the order passed by the court below and remand the matter for fresh disposal.

In the result, Execution First Appeal is allowed. Order passed by the executing court in E.A.No.374/1999 in E.P.No.283/1997 in O.S.No.858/1987 is hereby set aside. E.A. is remanded to the executing court for fresh disposal in accordance with law. There will be a direction to the executing court to dispose of the matter within a period of three months from the date of appearance of the parties. Parties shall appear in the court below on 17.9.2007.

C.M.P.No.4155/2001 will stand dismissed.

K. PADMANABHAN NAIR
JUDGE

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K.PADMANABHAN NAIR, J.

E.F.A. No.18 of 2001

JUDGMENT

10th August, 2007.